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No. 1075

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES, PETITIONER

v.

ALBERT G. HARRISON, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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THE UNITED STATES, PETITIONER

v.

ALBERT & HARRISON, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above-entitled case on December 2, 1946.

OPINION BELOW

The opinion of the Court of Claims (R. 18–21) is reported at 68 F. Supp. 732.

JURISDICTION

The judgment of the Court of Claims was entered on December 2, 1946 (R. 22). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether a bidder was coerced into entering into a Government contract where, after being informed of the award of the contract, he seeks to withdraw his bid as unduly low because of allegedly misleading drawings but nevertheless signs the contract because of a threat to enforce the bid bond.

2. Whether, after signing the contract in the above circumstances and completing performance, the contractor may recover as extras certain work required by the contract.[1]

STATUTE AND CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the Davis Bacon Act (Act of August 30, 1935, 49 Stat. 1011) and of the contract and specifications here involved are set forth in the Appendix, *infra*, pp. 16–23.

STATEMENT

The facts as found by the court below may be summarized as follows:

[1] Should a writ of certiorari be granted, the Government reserves the right to submit argument on the additional question whether the determination of the Secretary of Labor of prevailing wage rates as the minimum below which the contractor may not pay is a representation to the contractor that he will not be required to pay more, so that when the Secretary determines a higher minimum wage rate for the area generally but does not increase the rate fixed in the contract, and the contractor pays the higher rate to his employees after a dispute to which the Government is not a party, the Government is liable for the difference between the contract and higher rate.

On April 23, 1941, Albert & Harrison, Incorporated (contractor) entered into a contract with the United States, acting through the Ordnance Department, United States Army, for the renovation of Buildings M–4, N–5, and L–3 at the Raritan Arsenal, Metuchen, New Jersey, in accordance with certain specifications, schedules and drawings which were made part of the contract (R. 7). The work was completed by July 5, 1941, and the contractor has been paid the contract price, as adjusted for change orders, except for the deduction of $950 as liquidated damages for delay (R. 7). On December 10, 1941, contractor filed with the contracting officer a claim for additional brickwork and for the difference in bricklayers' wages, which claim was rejected on March 6, 1942 (R. 17). Subsequently, on June 29, 1942, the Secretary of War and on April 8, 1943, the General Accounting Office rejected the claim (R. 17–18). Suit was thereafter brought in the court below to recover for (1) alleged additional brickwork, (2) increased costs on bricklayers' wages and (3) remission of liquidated damages. Judgment for $19,766.95 was entered for contractor on all three claims.[2]

[2] The United States does not seek review of, nor does it intend to argue, if a writ of certiorari is granted, the propriety of that portion of the judgment below relating to the remission of $950 liquidated damages.

1. *Alleged Additional Brickwork.*—Specification S–C 1, Appendix, *infra,* p. 21, and Article 1 of the contract, Appendix, *infra,* p. 16, stated that the brickwork on the buildings was to be done in accordance with the drawings.[3] The drawing of the two buildings M–4 and L–3 (D–197) indicates fourteen large doors in the east and west wall of each building, and bears the notation parallel to the exterior wall line:

> Replace existing doors, east and west walls with brick and doors as indicated.

On this drawing there is also an elevation indicating a portion or bay of outside walls containing one door. There are seven of these bays shown in each wall. On each side of the door in this "Typical Bay," there appears the word "Brick" in very light letters. The light lettering of the word indicates that the existing wall is brick. The area is not heavily hatched in as showing new work.

Section G–C 2 of the specifications, Appendix, *infra,* p. 20, advised bidders of the desirability of visiting the site of the work but contractor prepared its bid without complying with this suggestion (R. 12). On April 23, 1941, contractor was notified that its bid was accepted (R. 11), and

[3] There is no question that the drawing of building N–5 (D–198) indicated all existing and proposed openings in the building; and hence the contractor has not sought any additional compensation for the brickwork done on that building (R. 11).

A. S. Harrison, contractor's secretary and treasurer, who had prepared the bid, went to the arsenal to sign the contract (R. 11). Mr. Harrison then noticed that buildings L–3 and M–4 contained 116 doors and openings not shown on the drawings and of which he had no prior knowledge (R. 11) although all these openings could be plainly observed at the site (R. 12). When informed that all these openings were to be bricked up, Mr. Harrison stated that the bid did not include the work of bricking up the openings, and that new bids should be called for (R. 11). The Government's construction engineer at the arsenal advised that if contractor failed to sign the contract and proceed, its bid bond would be forfeited (R. 11). Mr. Harrison left without signing, but returned on the following day, at which time he renewed his request that new bids be called for (R. 11). This the contracting officer refused to do, indicating that the drawing D–197 contained the necessary information, including all doors and work to be performed, and stating that contractor must proceed with the work (R. 11). Contractor signed the contract (R. 12), and on May 5 started the work under oral protest (R. 12).[4]

[4] Subsequently, contractor received a "Revised Drawing" D–197 which indicated revision as of May 2, 1941, and showed clearly 144 openings, including the 116 here involved. This drawing, contractor contended, was handed to its representative by the contracting officer's assistant, but the contracting officer contended that the drawing was a tracing, unapproved

The court below held that the specifications and drawings had the effect of misleading contractor into making a bid which it otherwise would not have made (R. 20); that enforcement of the bid bond would expose the contractor to liability to the Government (R. 20); and accordingly that contractor was coerced "into signing the contract when the Government had no right to a contract based on the [contractor's] bid" (R. 20). The court, Judge Whitaker dissenting, found contractor entitled to recover $17,600 on this claim. (R. 18).

2. *Labor Claim.*—In accordance with the Davis Bacon Act of 1935, Article 28 of the contract,

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by him and not connected with contractor's work (R. 12). On May 17, 1941, contractor wrote to the commanding officer, Raritan Arsenal, that it had examined the revised drawing and requested advice "whether you want us to do this work and we will submit our proposal to you" (R. 12). In reply, the contracting officer, on May 19, 1941, advised that drawing D–197 had not been revised and requested the return of any copies of that drawing bearing a revision date subsequent to the date of the contract. On May 21, 1941, contractor again wrote to the commanding officer:

"In accordance with your instructions, we are proceeding with the removals of the doors and the bricking up of the openings under protest." (R. 12.)

To this, the contracting officer replied on May 24, 1941:

"Receipt of your letter of May 21, 1941, relative to the renovation of buildings N–5, M–4 and L–3 at this arsenal, is acknowledged.

"It is presumed that the instructions to which you refer in your letter are my oral directions to you to proceed with the work as called for in the contract. These instructions are confirmed and made a matter of record." (R. 12.)

No appeal was taken at that time from the action of the contracting officer expressed in these letters.

Appendix, *infra*, p. 20, and Section S–C 9 of the specifications, Appendix, *infra*, obligated the contractor to follow a schedule of minimum wage rates determined by the Secretary of Labor on October 26, 1940 to be the prevailing rates of wages for crafts specified to be employed on this contract. The Secretary had found the rate of wages for bricklayers to be $1.50 per hour (R. 14). On April 4, 1941, the Department of Labor increased the prevailing rate of wages for bricklayers in the Raritan Arsenal area to $1.75 per hour (R. 14).

When contractor started work on the contract, the business agent of the bricklayers' union claimed to it that the prevailing wages for bricklayers for the area of the site was $1.75 per hour and that the Department of Labor's representatives had sometime in April of 1941 recognized such rate in the area (R. 14). An arrangement was made between contractor and the bricklayers' union to submit the question to arbitration (R. 14). After completion of the work, the arbitrator decided that $1.75 per hour was the prevailing wage rate for bricklayers in that area (R. 14).

While conceding that the specifications were undoubtedly prepared before the new wage scale was recognized, the court below held that this new wage scale was set some weeks before the contract was made, and contractor should have

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been advised (R. 20); that although the determined rate is only a minimum, it is the prevailing rate which "is by hypothesis the rate customarily paid and the rate at which a contractor could expect to hire his labor" (R. 20); accordingly, it held that since "the claim of the bricklayers for $1.75 was based entirely upon the fact that the prevailing rate as determined by the Secretary of Labor was, in fact $1.75," and "the Government had represented that it was $1.50" (R. 20–21), contractor is entitled to recover because of the misrepresentation (R. 21). It entered judgment for $1,216.95 on this claim (R. 18).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

(1) In holding that in the circumstances of the present case the threat to enforce the bid bond was coercive.

(2) In holding that the contractor after signing, executing and completely performing the contract may recover extra compensation for the alleged additional brickwork.

(3) In holding that the wage rates determined by the Secretary of Labor were representations on which the contractor was entitled to rely as the rates which he could expect to hire labor.

(4) In failing to hold that under the instant contract contractor was not required to pay more than the wage rates determined therein.

(5) In holding that the Secretary's determination of minimum rates for the Raritan area at a level higher than those determined in the instant contract was cause for imposing liability on the United States for contractor's increased labor cost.

(6) In entering judgment for respondent on the two claims here involved.

REASONS FOR GRANTING THE WRIT

1. The holding of the court below permitting the contractor to recover its costs for bricking up the 116 doors in controversy, on the theory that the threat to enforce the bid bond coerced it into signing the contract and hence entitled it to recover extras in excess of the contract price, is not only unsound but conflicts with the decision of the Court of Appeals for the District of Columbia in *Board of Trustees, etc.* v. *O. D. Wilson Co.,* 133 F. (2d) 399 (App. D. C.), and is inconsistent with the court below's earlier decision in *Massman Construction Co.* v. *United States,* 102 C. Cls. 699, certiorari denied, 325 U. S. 866.

In both the *Massman* and the *Wilson* cases, the courts refused to allow recovery for extras to a contractor who allegedly had discovered the omission of certain items of cost from his bid prior to the signing of the contract, but had signed the contract under threat of enforcement of his bid bond. In the *Massman* case, the Court

of Claims held that if the District Engineer reasonably thought that the contractor did not have the right to be released from its bid bond without penalty, his refusal voluntarily to release the contractor was not improper. In the *Wilson* case, the Court of Appeals did not regard the threat to enforce the bid bond as coercive, since if the contractor had the right to rescind, the Board of Trustees had no power to make good its threat. Both these cases are correct since the question of liability on the bid bond was litigable (*Moffett, Hodgkins, etc. Co.* v. *Rochester,* 178 U. S. 373), and the courts have consistently held that where one is entitled to litigate, there is no duress or unconscionable conduct justifying rescission or reformation of the transaction allegedly induced thereby. *Hartsville Oil Mill* v. *United States,* 271 U. S. 43; *Silliman* v. *United States,* 101 U. S. 465; *In re Prima Co.,* 98 F. (2d) 952, 964–966 (C. C. A. 7), certiorari denied *sub nom. Keig* v. *Harris Trust & Savings Bank,* 305 U. S. 658; *McKenzie-Hague Co.* v. *Carbide & Carbon Chemicals Corp.,* 73 F. (2d) 78, 83–85 (C. C. A. 8); *Dick* v. *Marx & Rawolle,* 4 F. (2d) 879 (App. D. C.), certiorari denied, 268 U. S. 688; Williston on Contracts (Rev. Ed., 1937) § 1606.

These principles, we submit, are controlling in the present case. As in the *Massman* case, the contracting officer reasonably thought that the contractor had no right to be released without penalty, and hence his refusal to release the con-

tractor was not improper. The specifications described the work to be done as follows: "The renovation of Building — by the replacing of existing doors with brick, metal doors and sash as indicated." At most, there was an ambiguity as to what the phrase "as indicated" modified. The contracting officer construed it to modify "brick, metal doors and sash," rather than "replacing."[8] In these circumstances, the contracting officer "had the right, and probably the duty, to insist upon what he, reasonably, thought were the Government's rights" (102 C. Cls. at 719).

In the present case, as in the *Wilson* case, the contractor chose to sign the contract "under no mistake, for it then knew all the facts including its former mistake" (133 F. (2d) 400). Moreover, as in the *Wilson* case, the contractor had the choice of refusing to sign and litigating its right to withdraw or of signing the contract and assuming the risk of not recovering for the alleged extras. If, as the court below found, the contractor had the right to withdraw its bid (R. 20), it of course, would not have been subject to any liability on its bid bond and the contracting officer "had no power to make good [his] threat. [His] denial of the right to rescind did not conclude the question. Appellee could litigate it.

[8] This construction is binding since the specifications G–C 15, Appendix, *infra*, pp. 20–21, clearly stated that the contracting officer shall be the interpreter of the drawings and the specifications.

Appellant was equally entitled to litigate it or, as it did in effect, threaten to litigate it. It follows that there was no duress. Appellee simply chose to contract and perform rather than have its right to rescind judicially determined. It is bound by the contract and cannot recover in this action." (133 F. (2d) at 400.)

The contractor's execution of the contract "under oral protest" (R. 12) because of the mistake in its bid price adds nothing to its rights. The contractor, having chosen not to rescind its bid, conceivably voidable if based on a mistake of fact (Williston on Contracts (Rev. Ed., 1937) §§ 15, 1626), elected to contract with the Government at its bid price (R. 12) and thus terminated any right to reformation thereof. See *Restatement of Contracts* § 431 (comment g); Williston, *supra,* § 1528; cf. *Restatement of Restitution* § 68. In the *Wilson* case, where the contractor likewise signed the contract, "reserving all rights arising from its estimator's mistake" the contractor "could not on any theory contract, perform, collect the full contract price, and then repudiate the contract and recover as if there had been none. It could not acquire such a right by purporting to 'reserve' it" (133 F. (2d) at 399, 400). To allow the contractor relief in these circumstances would "be making for the parties the very contract which one of them, the Government, expressly refused to make * * *

though requested to do so by the [contractor]" (*Massman Construction Co.* v. *United States*, 102 C. Cls. at 717).

The court below did not refer to the *Wilson* case, and attempted to distinguish the *Massman* case on the ground that in that case, "the Government was in no way at fault or responsible for the [contractor's] mistake and the [contractor] was probably not entitled to withdraw its bid" (R. 20). This distinction, we submit, is wholly lacking in significance. While in the present case the contractor may not have been wholly responsible for the situation which arose, it clearly contributed to it by failing to visit the site and inspect the work on which it was bidding. Moreover, whether the contractor was coerced into signing the contract is not determined by fixing responsibility for the erroneous bid. Finally, if, as the court below held, the United States were solely responsible for the alleged error, the denial of recovery in the present case would appear *a fortiori* to follow, for then there could be no doubt that the contractor could not be held on its bid bond; there could be no doubt that there was no economic pressure on it to sign the contract, and hence no justification for finding coercion. Cf. *Board of Trustees* v. *O. D. Wilson Co.*, *supra*, at 400.

2. The questions here presented are important and merit review by this Court. In addition to

conflicting with the *Wilson* case, the decision below by permitting bidders to withdraw their bids without penalty in the present circumstances vitiates the value of the irrevocable bid bond by resurrecting the evils which the Government's present system of sealed bids was designed to eliminate. If, after the bids have been opened, the reletting of the contract may be required where there is any ambiguity in either the drawings or specifications, any subsequent bid could be expected to be lower than the second bid only, and not to be the lowest amount for which the work could be done. If, on the other hand, the contractor is permitted to sign the contract and thereafter recover for the alleged extras, the net effect may very well be that the contract actually is not let to the lowest responsible bidder, for the sum of the contract price plus the extras which the contractor is allowed will frequently be in excess of the rejected competitive bids. As the court below recognized in the *Massman* case, "To make the system work without undue delays and without the opening of the bids being used unfairly to obtain a disclosure of what competitors are offering, it is necessary that the bids be firm bids, backed by a guaranteed willingness to sign a contract at the bid price. To have a set of bids discarded after they are opened and each bidder has learned his competitor's price is a serious matter, and it should not be permitted except for cogent

reasons" (102 C. Cls. at 718–719). No such cogent reasons, we submit, are here present.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

FEBRUARY 1947.

APPENDIX

1. The pertinent provisions of the Davis Bacon Act, Act of August 30, 1935, 49 Stat. 1011, 40 U. S. C. 276a *et seq.* follows:

> SEC. 1. * * * the advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent de-

duction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics, and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work; and the further stipulation that there may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

SEC. 4. This Act shall not be construed to supersede or impair any authority otherwise granted by Federal law to provide for the establishment of specific wage rates.

2. The pertinent provisions of the contract follow:

ART. 1. *Statement of Work.*—The contractor shall furnish the materials, and perform the work for:

The renovation of Buildings N–5, M–4 and L–3, at Raritan Arsenal, Metuchen, New Jersey, in accordance with Drawings D–198, D–197, C–164, and C–165, General and Special Conditions and Specifications, in accordance with Contractor's proposal dated April 22, 1941, Item one (1) to three (3) inclusive, and Amendments Nos.

1 and 2, dated April 18, 1941 and April 21, 1941, respectively.

Item 1a. Building N–5: The renovation of Building N–5 by the replacing of the tile in existing East & West walls with brick. The brick veneer of the North & South walls. New metal doors and sash. The construction of certain office and toilet space, together with the necessary plumbing, masonry, metal work and glazing.

b. Building M–4: The renovation of Building M–4 by the replacing of existing doors with brick, metal doors and sash as indicated. The brick veneer of the North and South walls. New metal doors and sash. The construction of certain office and toilet space together with the necessary plumbing, masonry, metal work and glazing.

c. Building L–3: The renovation of Building L–3 by the replacing of existing doors with brick, metal doors and sash as indicated. The brick veneer of the North and South walls. New metal doors and sash. The construction of certain office and toilet space together with the necessary plumbing, masonry, metal work and glazing. * * *

ART. 2. *Specifications and drawings.*— The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures, drawings, or spec-

ifications, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

* * * * *

ART. 5. * * * Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

* * * * *

ART. 17. *Rate of wages* (in accordance with the act of August 30, 1935, 49 Stat. 1011 (U. S. Code, title 40, sections 276a and 276a–1), this article shall apply if the contract is in excess of $2,000 in amount and is for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union or the District of Columbia).

(a) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the specifications, regardless of any contractual relationship which may be alleged to exist between the contractor

or subcontractor and such laborers and mechanics; and the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work The contracting officer shall have the right to withhold from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

* * * * *

ART. 28. *Rates of wages.*—The Act of Congress (Public No. 403, 74th Congress) approved August 30, 1935, "To amend the Act approved March 3, 1931, relating to the rates of wages for laborers and mechanics employed by contractors and subcontractors on public buildings," applies to this contract. A schedule of minimum wage rates has been determined by the Secretary of Labor on October 26, 1940, to be the prevailing rates of wages for the crafts specified to be employed under this contract.

3. The pertinent provisions of the specifications follow:

G–C 2. *Visiting site.*—The bidder should visit the site and acquaint himself as to local conditions, availability of water, electric power, roads, soil conditions, and the relation of finished grade of the building to existing grades and the natural surface of the ground.

G–C 15. *Interpretation of contract.*—Unless otherwise specifically set forth the Contractor shall furnish all materials, labor, etc., necessary to complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the C. O. shall be the interpreter. Except when otherwise indicated, no local terms of classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.

G–C 27. *Discrepancies.*—Where no figures or memoranda are given, the drawings shall be accurately followed according to scale. In any case of discrepancy in the figures on drawings, the matter shall be immediately submitted to the C. O. without whose decision said discrepancy shall not be adjusted by the Contractor, save only at his risk; and in the settlement of any complication arising from such adjustment the Contractor shall bear all extra expense involved.

In case of difference between drawings and specifications, the specifications shall govern.

G–C 33. *Extras.*—Except as otherwise herein provided, no charge for any extra work on material will be allowed unless the same has been ordered in writing by the Contracting Officer and the price stated in such order.

S–C 1. *Description of work.*—The work includes the furnishing of material and equipment and performing all necessary labor to construct and complete the following:

A. *Building N–5.*—The renovation of Building N–5 by the replacing of the tile in existing East & West walls with 8″

brick walls. The brick veneering of the North & South walls. Certain roof repairs. New metal doors & sash as required. The construction of certain office and toilet space together with the necessary plumbing, masonry, metal work, painting & glazing. Remove old concrete chimney on north wall.

B. *Building M–4.*—The renovation of Building M–4 by the replacing of existing doors with brick, metal doors & sash as indicated. The brick veneering of the North & South walls. Certain roof repairs. New metal doors & sash where required. The construction of certain office & toilet space together with the necessary plumbing, masonry, metal work, painting & glazing.

C. *Building L–3.*—The renovation of Building L–3 by the replacing of existing doors with brick, metal doors & sash as indicated. The brick veneering of the North & South walls. Certain roof repairs. New metal doors & sash where required. The construction of certain office and toilet space together with the necessary plumbing, masonry, metal work, painting & glazing.

At the Raritan Arsenal, Metuchen, New Jersey, in accordance with the specifications herein contained; and drawings:

D–198 Bldg. N–5
D–197 Bldg. L–3 & M–4
C–164 Steel Swing Door Details
C–165 Steel Roller Curtain Door Details

S–C 9. *The act of Congress.*—(Public No. 403, 74th Congress) approved August 30, 1935, "To amend the Act approved March 3, 1931, relating to the rates of wages for laborers and mechanics employed

by contractors and subcontractors on public buildings,"—applies to this project, and in accordance with the provisions of said Act the following schedule of minimum wage rates has been determined by The Secretary of Labor on October 26, 1940, to be the prevailing rates of wages for the crafts specified to be employed on the construction of:

Name of project..... Renovation Buildings N-5, M-4, L-8.
Post..... Raritan Arsenal.
County..... Middlesex.
State..... New Jersey.

Classification of labor:	*Rate per hour*
Bricklayers	$1.50

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IN THE

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OCTOBER TERM, 1946.

No. 1075.

THE UNITED STATES, *Petitioner*,

v.

ALBERT & HARRISON, INCORPORATED, *Respondent*.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

FOSTER WOOD,
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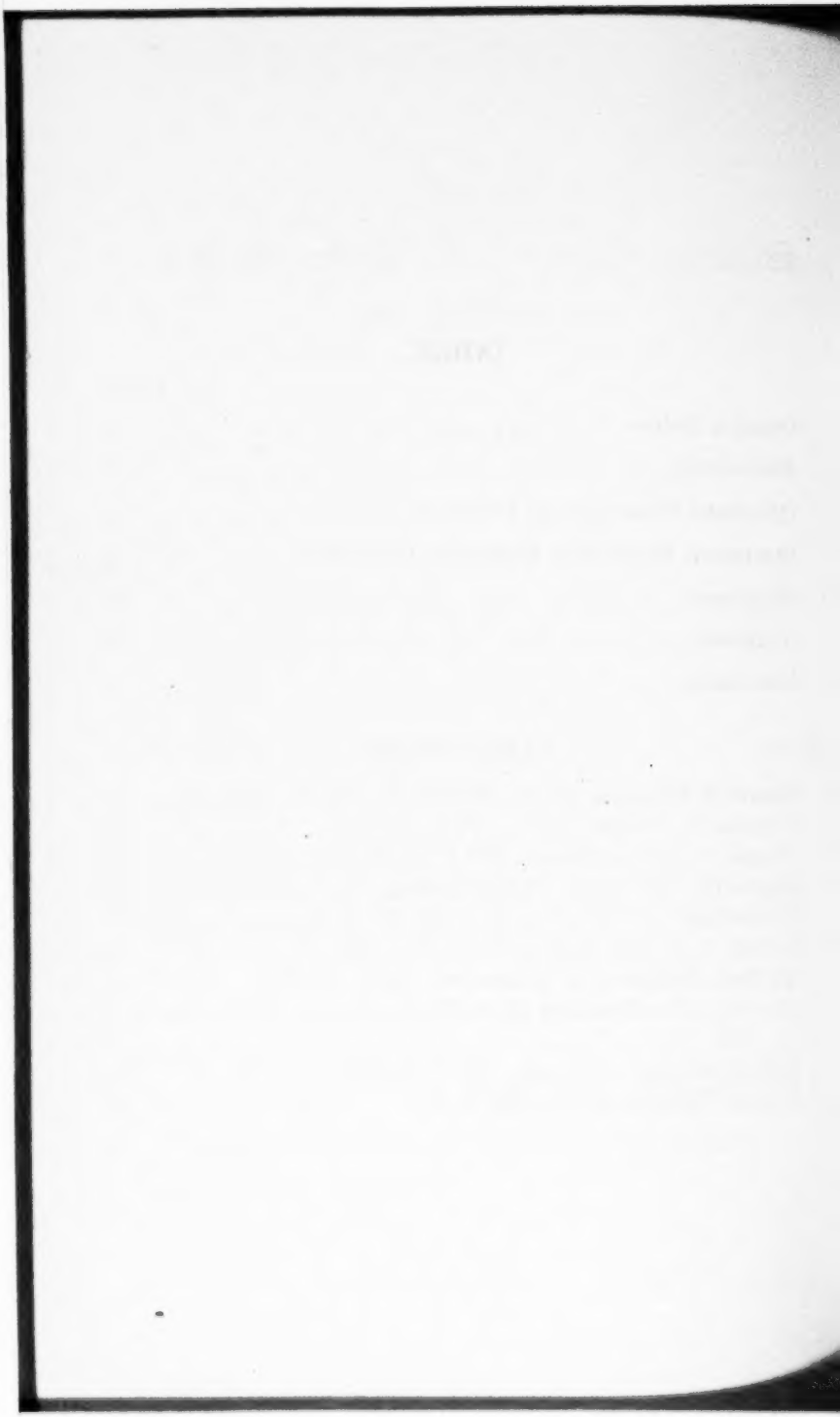

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1075.

THE UNITED STATES, *Petitioner*,

v.

ALBERT & HARRISON, INCORPORATED, *Respondent*.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the Court of Claims (R. 18-21) is reported in 68 F. Supp. 732.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED BY PETITIONER.

1. Whether a bidder was coerced into entering into a Government contract where, after being informed of the award of the contract, he seeks to withdraw his bid as unduly low because of allegedly misleading drawings but nevertheless

signs the contract because of a threat to enforce the bid bond.

2. Whether, after signing the contract in the above circumstances and completing performance, the contractor may recover as extras certain work required by the contract.

STATEMENT RELATIVE TO QUESTIONS PRESENTED.

Respondent is of the opinion that the facts as found by the Court and the opinion of the Court do not justify question 2 as worded by petitioner. It is Respondent's contention that the work for which recovery was sought was an extra required to be performed under a revised drawing furnished the Contractor after the signing of the contract, and that this additional brick work was not called for or required under the original contract.

STATEMENT.

Invitations were issued to bid on the renovation of three one-story warehouses, 600 feet long, at Raritan Arsenal in New Jersey, accompanied by two drawings and specifications. The specifications called for the renovation of these buildings

> "* * * by the replacing of existing doors with brick, metal doors, and sash as indicated. * * *."

Drawing D-198, relating to building N-5, indicated all existing openings. Drawing D-197, relating to buildings M-4 and L-3 showed one large door in each of fourteen bays in each building. (Plaintiff's Exhibit 3)

On this drawing there appears an elevation marked "Typical Bay" indicating a bay with one large door. On each side of this door there appears the word "Brick" in very light letters, indicating that the existing wall is brick, nor is this area hatched in as is customary when showing new work. (R. 11)

This drawing indicated fourteen doors to be replaced with brick, metal doors and sash, in each of the two buildings, L-3 and M-4.

Respondent's did was based on these drawings.

When informed that its bid had been accepted, respondent's engineer who had prepared the bid, Mr. A. S. Harrison went to the arsenal to accept the contract.

Mr. Harrison noted a difference between buildings, L-3 and M-4 and the drawing of these buildings D-197, in that the buildings, contrary to the drawing, contained thirty-five doors in each east and west wall, there being five doors in each bay, rather than one as it appeared on the drawings.

Mr. Harrison called Colonel Kimble's attention to this discrepancy between the buildings and the drawing. Colonel Kimble informed Mr. Harrison that all of the openings were to be bricked up, whereupon Mr. Harrison stated that one hundred and sixteen of the openings did not appear on the drawings and had not been included in their estimate or bid and requested that new bids be called for. Colonel Kimble ordered plaintiff to proceed and stated if the contract was not signed, its bid bond would be forfeited. Mr. Harrison then went to New York and the following day returned with a Mr. Earl D. McClary, an engineer, and they called upon Colonel Woodberry, the contracting officer at the Arsenal, stating in substance what had been said the day before, but Colonel Woodberry also refused to permit them to withdraw. (R. 11)

Except for the fourteen doors shown on drawing D-197, covering buildings M-4 and L-4, neither the specifications nor drawings informed the contractor as to the number or location of the existing doors or openings to be removed. (R. 12)

The contract was then signed under protest to perform the work called for by the plans and specifications, and work was commenced. A day or two after the contract had been signed, the Contractor received from Captain Scott, the Officer in direct charge of the work, a revised drawing (Plaintiff's Exhibit 4), which indicated thirty-five doors in

the east and west walls of each building, or a total of one hundred and forty doors to be bricked up. This drawing also showed a "Typical Bay" in which there appear five openings. It also indicated a changed location of steam trench and of toilet room and changed the height of certain doors. (R. 13)

Contractor performed the brick work in accordance with the Revised plans and submitted its bill for bricking up the one hundred and twelve additional doors, as an extra.

ARGUMENT.

The decision of the Court of Claims is not unsound, nor does the decision conflict with the decision of the Court of Appeals for the District of Columbia, or with its own earlier decision.

Petitioner relies on the decision of the Court of Appeals for the District of Columbia in the case of *Board of Trustees, etc.* v. *O. D. Wilson Co.*, 133 F. (2d) 399; and the decision of the Court of Claims in *Massman Construction Co.* v. *United States*, 102 C. Cls. 699.

In each of these cases the Contractors, who sought to withdraw their bids, had erred in estimating the costs of the undertaking through mistakes of their own employees and the Government was in no respect at fault.

The Court of Claims in the present case, referring to the Massman case, said:

> "The situation is quite different from that in the Massman case, 102 C. Cls. 699. There the Government was in no way at fault or responsible for the plaintiff's mistake, and the plaintiff was probably not entitled to withdraw its bid. It was therefore, not improperly coercive for the agent of the Government to threaten to enforce the bid bond. Here the plaintiff's dilemma was the result of the Government's misleading documents." (R. 20)

In the other case cited by Petitioner, *Board of Trustees, etc.* v. *Wilson*, 133 F. (2d) 399, the Contractor sued the

School Trustees for the reasonable value of a floor installed in accordance with the plans and specifications, but which item the contractor's estimator had inadvertently omitted when preparing its bid. Upon discovery of the omission the Contractor sought to withdraw its bid and later sued for the value of this item. The District Court allowed it to recover for this work and the Court of Appeals, I think rightly, reversed the action of the trial court, and remanded the case to the lower court.

In the instant case not only did the United States, by the errors of its representatives, cause the losses complained of, but its representatives wrongfully denied being in error and threatened to penalize the contractor by the forfeiture of its bid bond, if it failed to sign the contract.

This Court in *Freund* v. *United States*, 260 U. S. 60, said:

> "We cannot ignore the suggestion of duress there was in the situation or the questionable fairness of the conduct of the Government, aside from the illegality of the construction of the contract insisted on. We think contractors are entitled to recover the reasonable value of their services, including a fair profit."

In *United States* v. *Smith*, 256 U. S. 11, the appellee had sued the United States for additional compensation because while excavating the bed of a river the contractor discovered a bed of limestone. The Government had represented that the material to be excavated consisted of clay, sand, gravel and boulders. Contractor's request for additional compensation was refused and contractor was told if it did not remove the bed of limestone it would be declared in default. This Court in its opinion said:

> "We concur, therefore, with the declaration of the Court of Claims, that the right of the appellees to recover the price of the work done by them is indisputable".

In *Hollerback* v. *United States*, 233 U. S. 165, this Court held that a loss resulting from a mistaken misrepresenta-

tion of an essential condition should fall upon the Government rather than upon the contractor, even though there are other provisions requiring contractor to make an independent investigation of the facts.

In *United States* v. *Gibbons,* 109 U. S. 200, this Court held the Government liable for increased costs to contractor where Government action necessitated building of additional walls by contractor.

> *Christee* v. *United States,* 237 U. S. 234;
> *Lowell* v. *United States,* 59 C. Cls. 494.

Hartsville Mill v. *United States,* 371 U. S. 43, cited by Petitioner, was distinguished from the present case when this Court referring to the Freund, Hunt and Smith cases hereinbefore cited said:

> "All were cases in which Government Contractors were called on to perform extra services, the representatives of the Government taking the position that the services demanded were stipulated for by the contracts."

In the present case the Contractor was required to perform extra brick work, the Government representative erroneously claiming that the work was called for by the plans and specifications.

The Court of Claims has found that this brick work was not called for by the plans and specifications and that it was an extra.

The submission of the Revised Drawing was an admission that this work had been omitted from the preceding drawing.

In *Moffett, Hodgkins and Clarke Co.* v. *Rochester,* 178 U. S. 373, city by Petitioner the plaintiff contractor had erred in its estimate and its bid having been accepted instituted suit again the City of Rochester, claiming the city had threatened to enforce its bid bond and praying for a reformation of the proposals to conform to asserted intention in making them, or their rescission and for injunction,

etc. Judgment was rendered for the Contractor by the Circuit Court and affirmed by this Court.

The Contractor, performed the brick work called for by the Revised Drawing and submitted its bill for this work as an extra, it not being work called for by the original plans and specifictions and the Court of Claims has found, that it is entitled to recover for this extra work.

Contractor wrongfully was placed in a dilemma as a result of the Government's misleading drawing. The increased costs were due to the Government's errors, not the contractors, and it should not be permitted to profit by its mistake.

The Government stated by its drawings you have fourteen doors in each building to brick up. When the contractor is about to sign the contract, it says you have seventy doors in each building to brick up, and if you don't sign this contract we will forfeit your bid bond.

Subsequent to the signing of the contract a Revised Drawing is handed to Contractor requiring additional work to be performed, including one hundred and twelve (112) additional doors to be bricked up. (R. 12)

The Government representatives were wrong when they failed to acknowledge their mistake and instead threatened the Contractor with a forfeiture of its bid bond if it did not sign the contract. The Revised Drawing was an acknowledgment of their error. Respondent performed the additional brick work specified in the Revised Drawing and should be paid for this work.

CONCLUSION.

For the reasons that have been stated above, it is submitted that the petition for a writ of certiorari to the United States Court of Claims should be denied.

Respectfully submitted,

FOSTER WOOD,
Attorney for Respondent.